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## THE UNIFORM NEGOTIABLE INSTRUMENTS LAW. IS IT PRODUCING UNIFORMITY AND CERTAINTY IN THE LAW MERCHANT?

"It is needless to quote encomiums on the bill. It speaks for itself. I do not know of a better statute to be found anywhere. Judge Lyman D. Brewster to the American Bar Association, 1898. [Referring to the Uniform Negotiable Instruments Law.]

"What is the use of a uniform law unless we have uniform decisions thereunder and how are uniform decisions to be reached except by paying attention to the decisions in other States under the same law? \* \* \* The reports of cases decided under the Negotiable Instruments Law do not show that this is being done." Hon. Amasa M. Eaton to the Commissioners on Uniform State Laws, 1909.

"While England, and most of the States of this country, have been consistent in making such statutes uniform, an examination of the holdings of the courts in which those acts have been construed, indicates a diversity of opinion." Rose, J., in *Hartington Nat. Bank v. Breslin*, 128 Northwestern Reporter, 659 (1910), Supreme Court of Nebraska. [Referring to the Uniform Negotiable Instruments Law.]

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Mr. Jeremy Bentham in October, 1811, writing from Queen-Square Place, Westminster, to Mr. James Madison, President of the United States offered to draft *gratis*,

"for the use of the United States, or such of them, if any, as may see reason to give their acceptance to it, a complete body of proposed law, in the form of statute law: Say, in one word a *Pannomion*, a body of statute law, including a *Succedaneum* to that mass of foreign law, the yoke of which in the wordless as well as boundless, and shapeless shape of *common alias unwritten* law, remains still about your necks:—a complete body, or such parts of it as the life and health of a man, whose age wants little of four and sixty, may allow of."<sup>1</sup>

Enthusiastically Mr. Bentham proceeded thus:

"Suppose, on the other hand, the proposed work executed, the proposed *Pannomion* completed:—in what state would the rule of action be among you in that case? Comprised it would be the whole of it, in a small number of volumes; the part necessary

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<sup>1</sup> This and the following quotations from Bentham's letters are in Vol. IV Jeremy Bentham's works (Edinburgh, 1843), pp. 453-530: the part entitled "Papers on Codification."

to each man in particular in some one small volume:—the whole heap of foreign lumber, existing and future contingent as completely superseded, rendered as completely useless, as an equal amount of school divinity or Rome-bred canon law.”

Mr. Madison, himself a lawyer, one of those whom Bentham delighted to stigmatize as Mr. Eitherside, replied declining to submit the offer and saying:

“I may be permitted to add that, with the best plan for converting the common law into a written law, the evil cannot be more than partially cured; the complex technical terms to be employed in the text, necessarily requiring a resort for definition and explanation to the volumes containing that description of law.”

But Mr. Bentham undeterred by the rebuff patiently pursued his end.

In 1814 he wrote to Governor Simon Snyder of Pennsylvania making the same proposal to that Commonwealth and persuasively urging its acceptance:

“Sir, it is to a feast that I am thus bidding you. Join hands with me, you and I will govern the world. Sir, I will show you how we shall govern it \* \* \* If then you have a code from me, the code you thus have, will be one that is a code accompanied with *reasons*. \* \* \* Giving reasons everywhere, rulers will not everywhere, without giving such as they would be ashamed to give, be able to give reasons nor therefore to give laws altogether different from ours, and thus, you see, our Empire spreads itself. \* \* \*

Two years later the Governor laid Mr. Bentham’s proposal before the legislature of Pennsylvania but no action was taken.

Mr. Bentham next addressed a circular letter to the Governors of all the States. The letter contained copies of the Madison correspondence and of the Snyder correspondence and contained the germ of the idea of uniform codification by all the States:

“Forasmuch as of the twenty different States of which your Union is composed, if the offer in question has any claim to regard in any one so has it in every other.”

Finally in 1817, “Jeremy Bentham, an Englishman, to the Citizens of the Several American United States” appeared as the

heading of a pamphlet of thirty closely printed pages which repeated the offer to draft a code, and thus contended for its utility and urged its adoption by the citizens themselves :

"In truth this code will rather be a set of authentic instructions for the judges with a collection of peremptory ordinances. \* \* \* In the code itself they will behold all the *considerations* capable of affording proper grounds for their decision: and, on each occasion it is to the text of the law that, in justification of such application as on that occasion they think fit to make of those same grounds, they will all along make reference." \* \* \* "Hear then from me the properties or qualities which \* \* \* a body of laws designed for all purposes without exception must be possessed of.

1. *Notoriety* or rather aptitude for notoriety—in respect of its contents; 2. Conciseness; 3. Clearness in respect of its language; 4. Compactness in respect of its form; 5. Completeness or say, all comprehensiveness in respect of its extent; 6. Intrinsic usefulness in respect of its character; 7. Justifiedness *i. e.* manifested usefulness in respect of the body of instruction by which in the form of principle and reasons it ought to be illustrated, justified, recommended and supported. \* \* \*

Of notoriety—\* \* \* yes; only in proportion as the conception a man has of it (*i. e.* the law) is clear, correct and complete can the ordinances of the law be conformed to, its benefits claimed and enjoyed, its perils avoided \* \* \* to lodge and fix in each man's mind that portion of the matter of law on which his fate is dependent—exists there that state in which this operation is not among the most important duties of the government. \* \* \* Accept my services in the book of the laws, my friends, so long as the United States continue the United States, among you and your posterity in every such accepting state shall every man, if so it please its appointed legislators, find, for most purposes of consultation, his own lawyer; a lawyer, by whom he can neither be plundered nor betrayed. Accept my services, no man of tolerably liberal education but shall if he pleases know—know, and without effort—much more of law, than at the end of the longest course of the intensest efforts it is possible for the ablest lawyer to know at present. No man, be he even without education in other respects, no man but, in his leisure hours so he can but read may, if so it pleases him, know more of law, than the most knowing among lawyers can possibly know it at present \* \* \* would you wish to know what a law—a real law—is? Open the statute book—in every statute you have a real law, behold in that the

really existing object: the genuine object of which the counterfeit and pretended counterpart is endeavored to be put off upon you by a lawyer as often as in any discourse of his the word common law is to be found.

Common law the name of an existent object?—oh mischievous delusion—oh impudent imposture.

Behold, my friends, how, by a single letter of the alphabet you may detect it. The next time you hear a lawyer trumpeting forth his common law call upon him to produce a common law; defy him to produce so much as any one really existing object, of which he will have the effrontery to say that that compound word of his is the name. Let him look for it till doomsday, no such object will he find."

Bentham died in 1832.

It is a grave mistake to suppose that his influence for codification ended with his life. "An eminent American disciple, Edward Livingston, between 1820 and 1830 prepared codes for the State of Louisiana and warmly acknowledged his obligations to Bentham."<sup>2</sup>

The New York code of 1848 was the second fruit of his efforts.<sup>3</sup>

In 1890 a noted American lawyer addressed the American Bar Association and, denouncing Bentham as a "crank—a man who cherishes his pet theories in the solitude of his own contemplation and disdains both the observation of the present and the study of the past," said: "We need look no further for the reason why his schemes have never recommended themselves to wise and practical legislators."<sup>4</sup>

But surely, in the light of all the facts subsequent to Bentham's death, this last assertion can no longer be truthfully made.

At the same meeting of 1890 another American lawyer, presenting the conflict of rules on the subject of commercial paper, ventured the thought that:

"It probably would not be possible to get the State legislatures to adopt at once complete commercial codes. By proper

<sup>2</sup> Sir Leslie Stephens' *Life of Bentham*, p. 221.

<sup>3</sup> See *Life and Works of David Dudley Field*.

<sup>4</sup> "The Ideal and the Actual in the Law," by James C. Carter, Vol. XIII, *Reports of American Bar Association*, p. 244 (1890).

efforts they could be gotten to adopt statutes making uniform the law on particular questions. For instance we might at first obtain the passage of a statute by the several State legislatures declaring that whenever the name of a person is written across the back of a note before its delivery to the payee he shall be held to be a joint maker of the instrument and subject to all the liabilities of a joint maker and entitled to all his rights." <sup>5</sup>

This speaker had little of the gift of prophecy. Little did he foresee the popularity of uniform codification of distinct branches of the law. The value of his modest and conservative program may be in future years a matter for our subsequent retrospection.

At the meeting of 1898 a voice like that of Bentham addressed the Association with reference to the proposed Uniform Negotiable Instruments Law. Here is the language with certainly the true and familiar ring:

"This code, if adopted, reduces the pre-existing statutory law on the subject by hundreds of pages." \* \* \* "Then again it should be remembered that a good code on any branch of the law especially commercial law in addition to greater brevity and certainty, does two things of supreme importance. First, it harmonizes all conflicting law on the subject, and secondly, it makes the law more accessible, and more intelligible to the people who desire to know it. These two advantages go far to outweigh all the objections urged against Partial Codification." \* \* \* "While separate and distinct codes in each State might well perpetuate differences, a code adopted by all the States of course so far removes all differences. It is practically a statement of existing law, and not an attempt to state what the law should be." <sup>6</sup>

The remaining events relating to the adoption of uniform American commercial codes are almost too familiar to require mention. The Uniform Negotiable Instruments Law (which in this paper will hereafter be referred to as the Act) has now been

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<sup>5</sup> "The Necessity for Uniformity in the Laws Governing Commercial Paper," by Henry C. Tompkins, Vol. XIII, Reports of American Bar Association, p. 247 (1890).

<sup>6</sup> Address of Judge Lyman D. Brewster on "Uniform State Laws," Vol. XXI, Reports of American Bar Association, p. 323.

Address of Judge Lyman D. Brewster on Uniform State Laws, Reports, Vol. XXI, of American Bar Association, pp. 329, 330.

adopted (with variations some of which are hereafter noted) in thirty-four States and Territories and the District of Columbia. Other uniform acts on other subjects recommended by the Commissioners on Uniform Legislation have been adopted in certain States.

Bentham "is said to have expressed the wish that he could awake once in a century to contemplate the prospect of a world gradually adopting his principles and so making steady progress in happiness and wisdom."<sup>7</sup>

Where does history show a more striking case of the posthumous success of a reformer? *Tu vicisti. O Bentham!*

\* \* \* \* \*

There are two periods in the history of every codification: *first*, that of the drafting and promulgating of the code by the act of the legislature: *second*, the ascertainment of the meaning of the language of the code by some duly constituted authority, *ex. gr.* the Courts. The Code in other words must be applied to actual cases as they subsequently arise from time to time and interpreted in relation to such actual cases.

In respect to the Act we are now in the second period—the period of interpretation.

The present paper has several subjects in view:

FIRST: The purpose is to show the present situation with respect to uniformity of interpretation of the same sections of the Act by different State Courts.

SECOND: The purpose is to discuss the question whether, if uniformity is being accomplished, the resulting rule of law is desirable.

THIRD: To point out some of the variations between the Act as originally recommended and the Act as adopted in several States, or modified by subsequent legislation.

FOURTH: The general utility of codification (apart from the possibility of uniformity of interpretation) in the light of the interpretation of the Act.

FIFTH: Those changes in the Act by amendment or repeal of certain Sections now needed in the interest of uniformity.

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<sup>7</sup> Stephens' Life of Bentham, p. 230.

The interpretations of the Act will now be discussed under headings which will state the questions involved and will refer to those sections of the Act applied by the Courts in determining the questions.

*(1) The Title of the holder of paper executed in blank and filled up by an agent of the maker in violation of his authority.*  
*Sec. 14.*

Two contradictory interpretations of Sec. 14 have arisen, one in England<sup>8</sup> and one in America.<sup>9</sup> The English interpretation is undoubtedly in accordance with the pre-existing rule of the law merchant.

The contrary American interpretation of this Section is possibly necessitated by Section 58 of the Act, which is not in the English Act. This difference will be more fully discussed later.

The question involved may be presented in the following form:

A signs a note in blank as to payee, amount and date, giving it to B for a certain purpose, with authority to B to complete the instrument under certain restrictions. B disobeys his instructions, fills up the blanks beyond the amount authorized, making it payable to C's order; who, ignorant of B's wrongdoing receives the instrument in a completed state, giving value for it. Is A liable to C?

The language of Sec. 14 applicable to the question is as follows:

"Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. \* \* \* In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such

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<sup>8</sup> Lloyd's Bank v. Cooke [1907], 1 K. B. 794.

<sup>9</sup> Ploeg v. Van Zuuk, 135 Ia. 350; s. c., 112 N. W. 807; s. c., 13 L. R. A. (N. S.) 490.

instrument, after completion is negotiated to a *holder in due course* it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

The question arises, can the payee be "a holder in due course"? If not, then if the payee under the law merchant could recover in the given case, does not Sec. 195, justify recovery by the payee, that section providing that "in any case not provided for in this Act the rules of the law merchant shall govern"?

The draftsmen of the English Bills of Exchange Act and of the Uniform Negotiable Instruments Law have defined the term "holder in due course." By referring to Sec. 52 of the Act it will appear that the definition contains four elements: (1) Such a holder must have received the instrument "complete and regular upon its face," (2) he must have received it before maturity (3) he must have taken it in good faith and for value (4) he must have received it without notice of infirmity in the instrument or defect in the title of the person negotiating it. It is therefore quite apparent that the Act so defines "holder in due course" that no one can tell whether a payee can or cannot be "a holder in due course."

It is not surprising therefore that in the application of the Act to the above situation two contradictory views exist. The English Court of Appeal, in 1907, (Construing s. 20 of the Bills of Exchange Act which is s. 14 of the Negotiable Instruments Law) held that the payee could recover.<sup>10</sup> Sir Richard Henn Collins, M. R., said:

"The question appears to me to be purely one of estoppel at common law. \* \* \* I do not think it is necessary for us in the present case to treat the rights of the parties as having to be ascertained by reference to the provisions of the Bills of Exchange Act \* \* \* because in my opinion the Common law doctrine of estoppel applies and the rights of the parties may be decided by reference to that doctrine."<sup>11</sup>

<sup>10</sup> Lloyd's Bank v. Cooke [1907], 1 K. B. 794.

<sup>11</sup> *Ib.* 799, 800.

The Supreme Court of Iowa, in the same year, decided the same question in exactly the opposite way.<sup>12</sup>

The Iowa Supreme Court admitting that "the conclusion which we reach is perhaps different from what it would have been had the Negotiable Instruments Act not been passed," *held*:

"We see no escape from the conclusion that, under the statute plaintiff *being not a holder in due course but the person to whom the note was made payable*, and to whom its delivery as an effective instrument was first made, took it subject to the defence that P had no authority to fill in \$2000 as the amount of the note and deliver it to plaintiff." <sup>13</sup>

The Iowa Supreme Court depended upon an English decision of 1901 <sup>14</sup> rendered by the Divisional Court. (Channell, J., rendering the opinion, Lord Alverstone, C. J., Darling, J., both sitting.) The Iowa decision assumes a pathetic aspect when we find that the English decision of 1901 is practically overruled by the English decision of 1907.<sup>15</sup> The embarrassment with which the Court of Appeal expressed its opinion that a payee could be "a holder in due course," (thereby differing in opinion from the Lord Chief Justice) is noticeable in the superlative courtesy of the language of the Master of the Rolls and of Lord Justice Cozens-Hardy. We are concerned however with this point that the facts in the case of 1901—Herdman v. Wheeler <sup>16</sup> are identical with the overruling case of 1907—Lloyds Bank v. Cooke.<sup>17</sup> The Master of the Rolls referring to Herdman v. Wheeler, said: "The circumstances of that case were very nearly the same as those of the present case, though possibly some distinction might be suggested."

But he suggests no distinction which is discernable.<sup>18</sup> Finally as to this decision of 1907 we notice that its effect is to hold that

<sup>12</sup> Pleog v. Van Zuuk, 135 Ia. 350 (1907).

<sup>13</sup> *Ib.*, pp. 358, 359.

<sup>14</sup> Herdman v. Wheeler [1902], 1 K. B. 361.

<sup>15</sup> Lloyd's Bank v. Cooke [1907], 1 K. B. 794.

<sup>16</sup> [1902], 1 K. B. 361.

<sup>17</sup> [1907], 1 K. B. 794.

<sup>18</sup> The suggestion is: "I doubt whether in that case the doctrine of estoppel could have been set up by the plaintiff." This view seems untenable,

by the operation of estoppel the payee as against the maker of the note may be in practical effect a "holder in due course" under Sec. 20 of the Bills of Exchange Act. The less deferential language of the concurring Lord Justice, Fletcher Moulton, is a flat contradiction of the position of the Divisional Court and of the Supreme Court of Iowa:

"These considerations lead me to the conclusion that the Act did not intend to impair the position of a payee as contrasted with that of an indorsee, and that a payee who has given value in good faith is intended to come within its provisions as a 'holder in due course' just as much as an indorsee. Finding, therefore, no indication in the Act of any intention to interfere with the position of a payee of a negotiable instrument in this respect, I arrive with some confidence at the conclusion that, in the circumstances of a case like the present, such a payee since the Act still occupies the favorable position which he would have had before the Act by virtue of the law of estoppel as applied to a case where a promissory note has been signed in blank by the maker and entrusted to another person to fill up."

Under the law merchant there was no incongruity in permitting a payee to recover against the maker or acceptor where the payee was an innocent third party deceived by the agent of the maker or acceptor. Mere proximity of the names on commercial paper is not conclusive as to privity; no more than apparent remoteness on the face of the paper is conclusive as to the absence of privity. The substance of the agreement is regarded and not the form of its expression in the commercial paper. Turning to the authorities of the law merchant we find that in *Russel v. Langstaffe*,<sup>19</sup> the indorser had signed in blank just before the

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as the defendant had signed a promissory note in blank and delivered it to another whom the defendant authorized to fill it up for 15 l. The recipient of the note filled it up to the plaintiff for 30 l. *Held*, the defendant was not liable on the ground that he was not "a holder in one course under the Bills of Exchange Act." The Court relied on the case of *Lewis v. Clay* [1897], 67 L. J. (Q. B.) 224, in so far as to say, "we certainly have the opinion of the late Lord Chief Justice [Lord Russell of Killowen] that a delivery to a payee for value is not a negotiating within the meaning of the Act." The judgment of the late Lord Chief Justice is, however, more properly sustainable on the other ground on which he bases the denial of the payee's recovery—fraud perpetrated on the maker as to the nature of the paper to be executed.

<sup>19</sup> *Russel v. Langstaffe*, 2 Doug. 514 (1780).

maker transferred to the plaintiff. The indorser was held liable though there was proximity. The signature of the defendant in blank is, said Lord Mansfield, "a letter of credit for an indefinite sum." So, too, in *Violett v. Patton*<sup>20</sup> there was proximity and yet the maker was held liable to the innocent plaintiff for the agent's breach of duty in wrongfully filling up the paper.<sup>21</sup>

It should be here noted that in both the two last cited cases the plaintiff actually knew before taking the paper that it was signed in blank. He relied on the representations of the person entrusted by the defendant with the paper to complete it.

Whether this rule be viewed as a law merchant exception to the general doctrine of special agency or as in accord with principles of agency is outside the issue.

The law merchant gave the payee the right of recovery against the maker on the principle that the principal in the transaction had put it into the power of the agent to wrongfully complete the principal's paper.

This episode concerning Section 14 exemplifies one of the constant dangers of codification. If rights are limited by a code to a certain class of persons and that class is defined in a code-definition there is constant danger lest the makers of the code have made the code definition too restricted and thereby have excluded from the class those who previously had enjoyed the rights thereafter limited to the code-defined class. In the foregoing case the oversight was in not recalling that the

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<sup>20</sup> *Violett v. Patton*, 5 Cranch, 142 (1809).

<sup>21</sup> *Accord*: *Bank v. Curry*, 2 Dana 142 (1834) (proximity and knowledge of blanks); *Fullerton v. Sturges*, 4 Oh. St. 530 (1855); (proximity and knowledge of blanks); *Page v. Morrell*, \*42 N. Y. 117 (1866) (proximity and knowledge of blanks); see notes 22-34 for other cases of proximity not causing privity.

A recent case decided in Washington in 1910 (the act having been adopted there in 1899), *Bowles Co. v. Fraser*, 109 Pac. 812 (1910), illustrates the failure to distinguish between privity and proximity. The payee in that case is treated as in privity with the drawer of a check, though the payee was a holder for value from a third person who caused the check to be so made out. The drawer had received value from the third person, but the third person having agreed with the drawer to use the check for one purpose applied it to paying a debt due from the third person to the payee. The Court held the payee was not a *bona fide* holder for value.

The decision is inconsistent with well settled principles of the law merchant. See *Daniels on Negotiable Instruments* (2d Ed.), §§174-176; *Munroe v. Bordier*, 8 Manning, Granger & Scott, 862 (1849); s. c. 65 E. C. L. R. 861; *South Boston Iron Co. v. Brown*, 63 Me. 139. See annotation of this case in present issue, *post*, p. 508.

payee of a note filled up by an agent contrary to authority could recover against the maker. It is one of the glories of the law merchant and also of the common law that they abhor precise definitions. The successful plaintiff suing on negotiable paper is sometimes called an "innocent holder," again, he is called "a purchaser for value before maturity," again "a *bona fide holder*." Call him any name you please. He recovers not because he fits a certain definition but because the facts as to his acquisition of the paper show he has certain rights under the law merchant. Under a code, however, rights are dependent upon the contingency that the terminology of the draftsman is both comprehensive and exact. The Iowa decision, under Sec. 14, also illustrates how the zeal for uniformity of interpretation is likely to impel one court to follow the erroneous prior interpretation of another court. The Iowa decision also shows the danger of overlooking a dissimilarity between the language of two codes, when interpretations of one are invoked to interpret the other. If the Act had not been in force in England and in Iowa, the Divisional Court and the Supreme Court of Iowa would have looked up the decisions under the law merchant and with so many precedents to guide them would never have fallen into the error of confounding proximity with privity. The body of precedents of the common law and of the law merchant are a safety-appliance. They give the judge examining them a liberal education in the subject before he decides the case before him. They safeguard him from new-fangled and preposterous doctrines. Codifiers of the law seem to forget this important part played by unwritten law. They sneer with Lord Hershell at

"roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions."<sup>22</sup>

The two English and the Iowa decision and the future American decisions straightening out the law upon this point

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<sup>22</sup> *Bank v. Vagliano* [1891], A. C. 107.

<sup>a</sup> *Hartington Bank v. Breslin*, 128 N. W. 659 (1910).

will be one object lesson out of many which will appear as time and code interpretation go on.

There is however a point of view, not advanced by the Iowa Court, from which its decision and that of a similar decision in Nebraska<sup>a</sup> appear in accord with the strictly literal interpretation of the American Act. Certainly a payee taking incomplete paper cannot under Section 52 be "a holder in due course." If the payee is not such holder, then under Section 58 of the American Act the paper in his hands is "subject to the same defenses as if it were non-negotiable."

This declaration in the first paragraph of Section 58 of the Act is not in the English Act; which wisely made the definition of a holder in due course not so inflexible as to put all other holders in the category of common law assignees.

The Iowa Court has however put its decision on the untenable ground that a payee cannot be a "holder in due course" under the Act. Therefore it would follow that in Iowa if the payee's name is wrongfully inserted by the maker's agent before delivery to the payee and without the payee's knowledge the latter cannot recover against the maker.

The closely related question has also arisen under Sec. 14. whether an indorsee (*i. e.*, a holder other than the payee) who takes blank paper can rely on the representations of the person entrusted to complete the paper or must ascertain the true extent of the agent's authority.

On this question before the Act the law merchant as settled by Lord Mansfield<sup>23</sup> was generally, if not universally, recognized throughout the United States<sup>24</sup> and the Federal Supreme Court.<sup>25</sup> The rule of the law merchant was that the person taking incomplete paper could rely upon the representations of the agent. This rule was expressly recognized in the States of

<sup>23</sup> *Russel v. Langstaffe*, 2 Dougl. 514 (1780).

<sup>24</sup> See decisions under following notes.

*Accord*: *Joseph v. Bank*, 17 Ark. 256 (1876); *White-Wilson, &c., Co. v. Egelhoff*, 131 S. W. 208 (1910) (Ark.).

<sup>25</sup> See *Angle v. N. W. Mut. Life Ins. Co.*, 92 U. S., at p. 338 (1875), citing *Russel v. Langstaffe*; *Violet v. Patton*, 5 Cranch, 142 (1809); (*Obiter*) *Michigan Bank v. Eldred*, 9 Wall. 544; *Goodman v. Simonds*, 20 How. 361 (1857).

Virginia,<sup>26</sup> Massachusetts,<sup>27</sup> Kentucky,<sup>28</sup> Ohio,<sup>29</sup> New York,<sup>30</sup> Maryland,<sup>31</sup> Louisiana,<sup>32</sup> Alabama,<sup>33</sup> Tennessee,<sup>34</sup> Indiana,<sup>35</sup> Mississippi,<sup>36</sup> Illinois,<sup>37</sup> Pennsylvania,<sup>b</sup> Arkansas,<sup>c</sup> and by *dictum* in Connecticut.<sup>38</sup>

The writer has been able to find only a single American decision to the contrary prior to the Act.<sup>39</sup>

The Courts of England however are said to have swerved from this doctrine of the law merchant about the middle of the nineteenth century. But the cases so often cited<sup>40</sup> did not necessarily involve the overruling of the King's Bench and Lord Mansfield. They also presented other determining facts.<sup>41</sup> Mr. Chalmers, however, viewed these cases as working an alteration

<sup>26</sup> Frank v. Lilienfeld, 33 Grattan 377 (1873).

<sup>27</sup> Greenfield Bank v. Stowell, 123 Mass. 196 (1876).

<sup>28</sup> Bank v. Curry, 2 Dana (Ky.) 142 (1834).

<sup>29</sup> Fullerton v. Sturges, 4 Ohio St. 529 (1855).

<sup>30</sup> Mitchell v. Culver, 7 Cowen 336 (1827); (*obiter*), Weyerhauser v. Dun, 100 N. Y. 150 (1885); (*obiter*), Redlich v. Doll, 54 N. Y. 234 (1873); Page v. Morrell, 3 Keyes, 117 (1866); Chemung, &c., Bank v. Bradner, 44 N. Y. 680 (1871).

<sup>31</sup> Boyd v. McCann, 10 Md. 118 (1856), (name of payee), (*semble*); Elliott v. Chestnut, 30 Md. 562 (1869), (name of payee inserted with leave of Court).

<sup>32</sup> Shultz v. Payne, 7 La. Ann. 222 (1852), (date).

<sup>33</sup> Huntington v. Bank, 3 Ala. 186 (1841), (entirely blank).

<sup>34</sup> Waldron v. Young, 9 Heiskill 777 (1872), (time note to run).

<sup>35</sup> Johns v. Harrison, 20 Ind. 317 (1863), (time note to run); Emmons v. Meeker, 55 Ind. 321 (1876), is not inconsistent when there was knowledge that the note was antedated under circumstances tending to show lack of authority.

<sup>36</sup> (*Semble*), Fanning v. Bank, 16 Miss. 139 (1847).

<sup>37</sup> City of Chicago v. Gage, 95 Ill. 593 (1880), (applying the principle to a non-negotiable bond).

<sup>b</sup> Wessel v. Glenn, 108 Pa. 104 (1884).

<sup>c</sup> See note 24.

<sup>38</sup> (*Obiter*), Bank v. Hyde, 13 Conn. 279 (1839).

<sup>39</sup> Inglish v. Breneman, 5 Ark. 377 (1843); 9 Ark. 122 (1848). But this Arkansas Court's erroneous idea that a forgery or alteration is committed by improperly filling up blanks is apparently receded from in the later Arkansas decision, Overton v. Matthews, 35 Ark. 146, 154 (1879).

<sup>40</sup> Awde v. Dixon, 6 Ex. Rep. 869 (1851); s. c., 1 Ames' Cas. 715; Hatch v. Searles, 2 Smale & Gifford 147 (1854); s. c., 1 Ames' Cases 718.

<sup>41</sup> The case of Hatch v. Searles, a decision of Vice Chancellor Stuart is explainable on the grounds that the plaintiff had notice of the fraudulent representation on the bill as to the residence of the acceptor, and that the acceptor died before negotiation. The case of Awde v. Dixon is discussed in the following note.

in the English law.<sup>42</sup> He accordingly drew the Bills of Exchange Act to nullify the doctrine of Lord Mansfield.

In America we have adopted in Section 14 of the Act the language of the section in the Bills of Exchange Act *verbatim*, (except the reference to stamped paper).<sup>d</sup>

In two States<sup>43</sup> decisions have been rendered interpreting the Act so as to overthrow the pre-existing established rule in those States, which rule was in accord with the American doctrine. This interpretation seems entirely in accord with the language of the Act. Mr. Crawford's annotation of the section affords no light as to its contemplated effect. In all the criticism that the Act received, its complete destruction of a fundamental doctrine of the American law merchant was overlooked until 1907.<sup>44</sup> Professor Greeley's prophecy is now fulfilled by the Virginia and Massachusetts cases above mentioned.

Section 14 is entirely useless. It overthrows the American law merchant as above shown,—and for no assigned sufficient reason. All that it states as to the *prima facie* authority of the holder to fill in blanks is a truism. The section reconciles no conflict but will produce it inevitably. The section ought to be repealed.

<sup>42</sup> Chalmer's Digest (7th Ed.), p. 53, is the exact language of the Code: "In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time and strictly in accordance with the authority given." He cites in support of this proposition, *Awde v. Dixon*, 6 Exch. 869 (1851); *Hanbury v. Lovett*, 18 L. T. N. S. 366 (1868); and *Oakley v. Boulton*, 5 Times L. R. 60 (1888). In the first case the plaintiff from the face of the instrument had notice that the note was to be signed by some one jointly and severally with the defendant. In the second case the decision was not on the question under discussion. The third case is a decision under the Bills of Exchange Act, and therefore of no importance as determining the law merchant. The case, moreover, is also decided on the ground of the plaintiff's bad faith.

<sup>d</sup> Sec. 20.

<sup>43</sup> *Guerrant v. Guerrant*, 7 Va. Law Reg. 642 (1902); *Boston Steel, &c., Co. v. Steuer*, 183 Mass. 140 (1903).

<sup>44</sup> 2 Illinois Law Review, p. 148. "The New Illinois Negotiable Instruments Act," by Professor Louis M. Greeley.

(2) *Liability of accommodation maker or acceptor, &c., to holder when the paper is taken after maturity. Sec. 29.*

American courts were about equally divided, before the Act, on the question whether accommodation paper could be transferred after maturity. In some States the fact that the paper was overdue affected the purchaser with notice of the fact of accommodation, and by law an accommodation was presumptively extended in such jurisdictions only to maturity.<sup>46</sup>

On the other hand there was a contrary doctrine in England<sup>47</sup> and in certain of the United States.<sup>48</sup> The English Bills of Exchange Act<sup>49</sup> embodied the doctrine of the English Courts. This section with a slight modification so as to apply to all accommodation parties was grafted on to the American Act and became Section 29.

\* *Chester v. Dorr*, 41 N. Y. 279 (1869), (accommodation without restriction). The later case, *East River Bank v. Butterworth*, 45 Barb. 476 (1866), affirmed in 51 N. Y. 637 (1872), is reconcilable with the foregoing, despite the dictum, if in fact the note was transferred before maturity: *Bower v. Hastings*, 36 Pa. 285 (1860), (accommodation without restriction); *Peale v. Addicks*, 174 Pa. 549 (1896), (accommodation with restriction, i. e., for accommodation of payee); *Hoffman v. Foster*, 43 Pa. 137 (1862), (accommodation with restriction); (*obiter*), *Cottrell v. Watkins*, 89 Va. 801 (1893); *Kellogg v. Barton*, 94 Mass. 527 (1866), (with restriction as to expiration of accommodation); *Bacon v. Harris*, 15 R. I. 599 (1887), (with restriction as to use, i. e., for firm); *Strauss v. Friend*, 73 Ga. 782 (1884), (without restriction).

See note in 57 Am. Law Register, Vol. 57, p. 662 (1909).

See also In England in *Parr v. Jewell*, 16 C. B. 684 (1855), (accommodation with restriction, i. e., bill not to be negotiated after maturity).

\* *Charles v. Marsden*, 1 Taunt. 224 (1808), (accommodation without restriction); *Sturtevant v. Ford*, 4 M. & G. 101 (1842), (accommodation without restriction); *Carruthers v. West*, 11 Ad. & El. (N. S.) 143 (1847), (accommodation with restriction, i. e., only until maturity and *plea held bad*, but see *Warr v. Jewell*, 10 C. B. 684 [1855]); *Stein v. Yglesias*, 1 C. M. & R. 565 (1834), (accommodation without restriction); *Jewell v. Parr*, 13 Com. Bench 909 (1853), (accommodation without restriction).

\* *Connerly v. Ins. Co.*, 66 Ala. 432 (1880), (accommodation without restriction: paper taken before maturity but advances made on the paper after maturity, probably impliedly, but not expressly overruling, *Battle v. Weems*, 44 Ala. 105 [1870]); *Warder v. Gibbs*, 92 Mich. 29 (1892), (accommodation without restriction); *Miller v. Larned*, 103 Ill. 562, 573 (1882), (accommodation without restriction); *Naef v. Potter*, 226 Ill. 628 (1907), (accommodation without restriction), (viewing the preceding case in accord with the view of Professor Greely in 2 Illinois Law Review, p. 150, and contrary to the view of Hon. J. W. Mack given in 1 Illinois Law Review, pp. 597, 598); (*semble*), *Seyfert v. Edison*, 45 N. J. (Law) 393 (1883), (accommodation without restriction); *Dunn v. Weston*, 71 Me. 270 (1880), (accommodation without restriction).

See note in 57 Am. Law Register, Vol. 57, p. 662 (1909).

\* Sec. 28.

The reason for the English doctrine is thus set forth by Lawrence, J.:

"Would there be any objection if, with the knowledge of the circumstances that this is an accommodation bill, some person should advance money upon it before it was due? Then what is the objection to his furnishing the money on it after it is due? For there is no reason why a bill may not be negotiated after it is due, unless there was an agreement for the purpose of restraining it."<sup>50</sup>

So far the only decision rendered under the Act holds that the purchaser after maturity obtains a good title. Thus in Wisconsin, though the accommodated party himself transferred the paper two years after maturity, the accommodation maker was held liable to the holder.<sup>51</sup>

Professor Brannan asks, "whether it is not the business view that there is an understanding that the accommodated party shall take care of the paper at maturity, which would be inconsistent with a right in the accommodated party to negotiate it after maturity?"<sup>52</sup> He submits "that there is nothing in the Act to negative this view," *i' e.*, the business view above mentioned. But to the writer the interpretation of the Wisconsin Court appears correct. Section 29 declares that the accommodation party "is liable to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." The term *holder for value* could include a purchaser after maturity but *holder in due course* could not.

The juxtaposition of the two expressions, "holder in due course" in Sec. 28 and "holder for value" in Sec. 29 indicates a purpose in Sec. 29, which would be unaccomplished by the expression "holder in due course." See also Sec. 191, which reads: "Holder means the payee or indorsee of a bill or note who is in possession of it or the bearer thereof." The conclusion to which the choice of these apt words in the Bills of Exchange Act points is that this statute was designed to codify the doctrine of Charles

<sup>50</sup> Charles v. Marsden, 1 Taunt. 224 (1808).

<sup>51</sup> Marling v. Jones, 138 Wis. 82 (1909); s. c., 119 N. W. 931; (*obiter*), Mersick v. Alderman, 77 Conn. 634 (1905).

<sup>52</sup> Brannan, "The Negotiable Instruments Law" (2d Ed.), p. 38.

v. Marsden.<sup>53</sup> Though we cannot assume that the legislature of any State adopting the Act knew of the conflicting American decisions yet each legislature is presumed to know that State's pre-existing law. Therefore the legislature of, for example, New York and Pennsylvania, must be presumed to have used the words in question with the knowledge that a purchaser for value after maturity of accommodation paper had, under the prior unwritten law, been denied recovery. So likewise in all other jurisdictions where accommodation terminates with maturity.

The intention of the draftsman was evidently to adopt the English rule. He adopted the English code.<sup>54</sup>

These arguments appear to outweigh the force of Sec. 58: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defences as if it were non-negotiable."

The Illinois Statute occupying a position midway between the English doctrine and that of many American States (*i. e.*, those which permitted transfer after maturity) restricts the transfer after maturity to cases where there is proof that "a transfer after maturity was intended by the accommodating party."<sup>55</sup>

The Wisconsin interpretation of the section, if generally followed, will of course work a revolution in the rule previously adopted in certain States. But does not Professor Brannan go a little too far in saying that "the case is contrary to the *majority* of the American States."<sup>56</sup>

There is an ambiguity, however, in Sec. 29. Suppose there is a restricted accommodation and the accommodated party violates his agreement with the accommodating party and transfers the paper after maturity to a holder who knows nothing of that agreement but merely knows of *the fact of accommodation*.

<sup>53</sup> 1 Taunton, 224 (1808); s. c. 1 Ames' Cases, 748.

<sup>54</sup> Mr. Crawford makes no forecast whether the Act will or will not alter the rule of New York as previously settled in *Chester v. Dorr*, 41 N. Y. 279, though he cited in a note to section 29, a Virginia case (*Cottrell v. Watkins*, 89 Virginia 801), wherein the opposing English and American lines of decision are plainly set forth.

<sup>55</sup> Brannan (2d Ed.), pp. 36, 37. See Illinois Revised Statutes.

<sup>56</sup> "The Negotiable Instruments Law" (2d Ed.), p. 38.

Does Sec. 29 give such a holder a clear title? The section is susceptible of being interpreted so as either to defeat or to sustain the title of the holder. To permit his recovery would be an innovation contrary to all pre-existing decisions<sup>57</sup> (to the writer's knowledge) save one.<sup>58</sup>

(3) *Paper rendered void by Statute. Sec. 57.*

Prior to the Act there was one universally accepted rule that on such paper there could not be recovery even by the innocent purchaser for value.<sup>59</sup>

The Act has introduced a conflict of judicial decisions,<sup>60</sup> has undermined and in some States overthrown a certain and long established rule of the law merchant and placed the question in the region of the doubtful problems and uncertainties of the law.

From 1741, when the leading case<sup>61</sup> was decided in England, for nearly one hundred and seventy years every Court, both of England and of this country, has construed the voiding Statutes as above stated.<sup>62</sup> No Court restricted the operation of the voiding statute merely to paper when in the hands of a party to the crime. "It will be a means to evade the Act, it being so very difficult to prove notice on an indorsee. And though it will be some inconvenience to an innocent man, yet that will not be a balance to those on the other side."<sup>63</sup> Such has been the key note of all the judicial decisions before the Act.

<sup>57</sup> See *ante*, notes 46, 47, 48.

<sup>58</sup> *Naef v. Potter*, 226 Ill. 628 (1907), citing, however, no cases. This decision will no doubt be followed in Illinois in cases arising under the Act.

<sup>59</sup> *Norton on Bills, &c.*, pp. 234-235; 242-243; *Bigelow on Bills & Notes*, pp. 229-231.

<sup>60</sup> *Klar v. Kostiuik*, 119 N. Y. Supp. 683 (1909). In New York by Laws of 1892, p. 1869, c. 689, a usurious note taken by a bank was excepted from the voiding statute.

<sup>61</sup> *Bowyer v. Bampton*, 2 Strange 1155 (1741); s. c., 1 Ames Cas. on Bills & Notes, 399.

<sup>62</sup> For example see among numerous others: *Lowe v. Waller*, 2 Doug. 736 (1781); *City of Aurora v. West*, 22 Ind. 88; *Cazet v. Field*, 9 Gray 329; *Towne v. Rice*, 122 Mass. 67; *Glenn v. Bank*, 70 N. C. 191; *Clafin v. Boorum*, 122 N. Y. 385; *Dunlap v. Sundberg*, 104 Pac. 830 (1909).

<sup>63</sup> *Bowyer v. Bampton*, 2 Strange 1155 (1741); s. c., 1 Ames' Cas. on Bills & Notes, 399.

Sec. 57 provides that: "A holder in due course holds the instrument free from any defect of title of prior parties and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

It certainly strains the imagination to see how this section can be viewed as a repeal of the prior statute of a State declaring certain paper void. How can one properly apply the words "defect of title of prior parties" to the case of one who being a party to the offence took a non-existing note or bill? Certainly the words "and free from defences available to prior parties among themselves" suggest the thought that real defences are not intended to be affected by the Act. The English Bills of Exchange Act, which, here as elsewhere has been the parent of so much of our Act reads "*from mere personal defences.*" It might be argued that by striking out these words the draftsman or draftsmen or legislature spoke of all kinds of defences real as well as personal. But then by coupling the retained word *defences* with the qualifying clause "*available to prior parties among themselves*" how could they have meant *all* defences? It is quite probable that the striking out of the words "from mere personal defences" was done to prevent tautology. If so, what rhetoric has gained uniformity has lost. Several Courts<sup>64</sup> have held that these voiding statutes are necessarily repealed by Section 57. Are we to understand that such also is Professor Brannan's view?<sup>65</sup> Contrary to these decisions is that of Kentucky.<sup>66</sup> This Court said:

"It is inconceivable that the General Assembly, in the passage of the Act of 1904 for the protection of innocent holders of negotiable instruments, intended to or did repeal Sec. 1955 Ky. St. 1903, which declares all gaming contracts void. In our opinion the disappointment now and then of an innocent holder of

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<sup>64</sup> Wirt v. Stubblefield, 17 App. (D. C.) 283 (1900); Klar v. Kostink, 119 N. Y. Supp. 683 (1909).

<sup>65</sup> See "The Negotiable Instruments Law," Annotated by Professor Brannan, Second Edition, Cincinnati. The W. H. Anderson Co., 1911.

Alexander v. Hazelrigg, 123 Ky. 677 (1906).

<sup>66</sup> Alexander v. Hazelrigg, 123 Ky. 677 (1906).

a negotiable instrument would not be as hurtful and injurious to the best interests of the State as the removal of the ban from gaming contracts."

That some of the other Courts will adopt this view <sup>a</sup> is certainly as probable as that others will adopt the view of the New York Supreme Court and of the Court of Appeals of the District of Columbia.<sup>b</sup> In order to guard against the possibility of these two latter decisions "the Illinois Act after the word 'themselves' interpolates a clause excepting the defences of fraud and circumvention and *gaming*, which are by Statutes referred to in said clause made real defences."<sup>c7</sup>

Gambling notes in the hands of *bona fide* holders are void in Illinois because of a statutory modification of the Act, and void in Kentucky because the Act is construed to make no change in the pre-existing law. But Gambling notes in similar hands are valid in Oregon because of a Statute passed subsequent to the adoption of the Act in that State.<sup>c8</sup>

Before more conflicting interpretations of Sec. 57 spring up a statute should be passed by each State similar to that of Illinois or similar to that of Oregon to the end that the public policy of the State may be expressed by the legislature definitely and not left to judicial conjecture based on Section 57.

#### (4) *Fraud as a Real Defence. Secs. 55, 56, 57.*

Fraud may exist under the law merchant either in false statements as to collateral matters inducing a person to execute an instrument, or in false statements as to the nature of the instrument he is about to execute. Fraud of the first class is under the law merchant merely a personal defence, unavailing against *bona fide* purchasers before maturity, or those deriving their title through them. Fraud of the second class is a real defence valid against such purchaser if the signing party has been

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<sup>a</sup> *Accord*: Western Nat. Bank, &c. v. State Bank, &c., 18 Col. App. 128 (1902); s. c. 70 Pac. Rep. 439 (1902).

<sup>b</sup> See *ante*, note 64.

<sup>c7</sup> Brannan (2d Ed.), p. 65.

<sup>c8</sup> B. & C. Comp., sec. 1945. See Matlock v. Scheuerman, 93 Pac. 823 (1908).

free from negligence.<sup>69</sup> How do the English code and its American duplicate codify this distinction of the law merchant?

Sec. 55 of the Act declares the title of a fraud-feasor to be defective. Sec. 56 declares what is notice of such defect to the person to whom transfer is subsequently made. Sec. 57 declares that "a holder in due course holds the instrument *free from any defect of title of prior parties*, and free from defences available to prior parties among themselves."

Let us suppose that the defendant has been induced to endorse a bill by the false statement that he is signing only a guaranty. The plaintiff innocently acquires the bill for value before maturity. Is the defendant liable under the Act?

So far no explicit interpretation of the Act has answered the question in the United States.<sup>70</sup> In England the interpretation is, like the law merchant, against the *bona fide* purchaser.<sup>71</sup> By specific statutory modification in Wisconsin the purchaser in good faith is *not* protected just as he was *not* protected under the law merchant, if the party defrauded has been duly careful.<sup>72</sup> But inasmuch as Section 57 has been already held in the District of Columbia<sup>73</sup> and in New York<sup>74</sup> to take away the real defence that the paper is void by statute we should certainly expect those jurisdictions, if not others, to hold that fraud as to the nature of the instrument is not a real defence under the Act. Of other jurisdictions some will probably follow the English interpretation of the Act.

No serious clog on the negotiability of paper seems to have been occasioned by the protection which the law merchant has

<sup>69</sup> *Foster v. MacKinnon*, Law Rep. 4 C. P. 704 (1869); 1 Ames' Cas. 540. See Ames' Cas., p. 547, n. 2, for cases in accord.

In Minnesota by statute. See Revised Laws, 1905, Sec. 2747.

In Illinois by statute. See *Freehold Bank v. Kennedy*, 148 Ill. App. 310 (1909). A contrary rule exists in West Virginia. See *Tower v. Whip*, 53 West. Va. 158 (1903).

<sup>70</sup> But see *Bothell v. Miller*, 128 N. W. 628 (1910), (Nebraska) holding fraud as to the nature of the instrument to be a real defence. But the case does not show the date of the note, hence it is impossible to say whether the case arose prior to, or under the act.

<sup>71</sup> *Lewis v. Clay*, 14 T. Law Rep. 149 (1897).

<sup>72</sup> Laws of Wisconsin 1899, ch. 356, secs. 1676-25; 1676-27, construed in *Aukland v. Arnold*, 131 Wis. 64 (1907). So in Illinois. See *Brannan* (2nd ed.), Sec. 57, p. 65.

<sup>73</sup> See *ante*, note 64.

<sup>74</sup> See *ante*, note 64.

given the defrauded signer. If such protection is to be uniformly continued an amendment of the Act seems desirable to prevent a contrary result. At all events some amendment seems to be demanded if uniformity is hereafter to be maintained as it was maintained before the Act.

(5) *The right of recovery of money paid by the drawee or acceptor under a mistake as to the genuineness of the drawer's signature. Sec. 62.*

Before the adoption of the Act the proposition expressed in what is known as the doctrine of *Price v. Neal*,<sup>75</sup> that neither the acceptor nor the paying drawee can recover money so paid, had been qualified by several exceptions supported by American decisions of the highest authority.<sup>76</sup> Does Section 62, providing that the drawee by accepting the instrument admits the genuineness of the drawer's signature, annihilate all these exceptions to the doctrine?

It has been held in two Missouri cases<sup>77</sup> that the Act disposes of this question by Section 62 relating to the acceptance of a bill and the admission thereby made as to the genuineness of the drawer's signature, viz.:

"Sec. 62, the acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance and admits,—

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument \* \* \*

In the Missouri Case, (No. 1)<sup>78</sup> the defendant bank cashed a check drawn on the plaintiff bank. An imposter represented himself to be the payee and the defendant without requiring his identification cashed the check to him and guaranteed the indorse-

<sup>75</sup> 3 Burrow 1354 (1762); 1 Ames' Cas. 407.

<sup>76</sup> The exceptions to *Price v. Neal* are presented in an elaborate note in 10 L. R. A. (N. S.), pp. 49-74.

See also Professor Ames on "The Doctrine of *Price v. Neal*" in 4 H. L. R., p. 292.

<sup>77</sup> *National Bank v. First National Bank*, 125 S. W. 513 (1910); s. c., 141 Mo. App. 719; *National Bank v. Mechanics', &c., Bank*, 148 Mo. App. 1 (1910).

<sup>78</sup> *National Bank v. First National Bank*, 125 S. W. 513 (1910); s. c., 141 Mo. App. 719.

ment and forwarded the check for collection to its correspondent. The plaintiff bank knowing that the signature of the drawer (its own customer) was not genuine paid the check relying on the defendant's endorsement. The plaintiff was denied recovery.

The Missouri Court of Appeals in an opinion by Gray, J., reviewing the contradictory views of American Courts which preceded the enactment of the Act concludes that:

"If a mere promise to pay a check is binding on the bank why should the absolute payment of the check not have the same effect? \* \* \* it may be said that there was no question upon which the Courts were more in conflict than upon the question involved in this case. After a careful examination of the new law we are inclined to believe that it was intended to adopt the law as declared in *Price v. Neal*."

In the Missouri case (No. 2) *National Bank, &c., v. Mechanics', &c., Bank, et al.*,<sup>79</sup> both the collecting bank and the person cashing the check to the payee and subsequently endorsing it were made defendants.

The plaintiff bank was the drawee and contended that the negligence of the defendants in cashing the checks to the payee made them liable to the plaintiff. It was held that the plaintiff could not recover on the ground that the Act had expressly introduced the doctrine of *Price v. Neal*. The Missouri Court referring to the previous decision said:

"The only material difference between that case and the cases now before us is that in the case \* \* \* (No. 1) negligence was neither pleaded nor in issue. Here it is. Judge Gray first disposing of the question on principle and on the authorities and independent of the statute follows the rule in *Price v. Neal*. He further holds that in the adoption of our Negotiable Instrument Law we have adopted the rule announced in *Price v. Neal*. \* \* \* Taking the same view of our Negotiable Instrument Law \* \* \* we hold that when our State adopted the Negotiable Instrument Law it adopted the rule announced in *Price v. Neal*. We are therefore not called upon to inquire into the soundness of that rule or whether modern decisions have overturned it. We are bound to it by force of our own statutory law."

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<sup>79</sup> *National Bank v. Mechanics', &c., Bank*, 148 Mo. App. 1 (1910).

The decision (No. 1) could have been rendered by any Court which recognized equitable exceptions *ex. g.* negligence, &c., to the doctrine of *Price v. Neal*. The drawee knew that the signature was not that of its customer. But the decision (No. 2) could not have been rendered by a Court which recognized the exception to *Price v. Neal* that a person cashing a check to a payee who is a stranger should ascertain the genuineness of the drawer's signature.

A Tennessee decision of 1905,<sup>80</sup> applying the Act, denied the paying drawee bank any recovery, saying, "The drawee when he accepts the check, makes himself the guarantor thereof." The facts are practically identical with a New York case<sup>81</sup> decided precisely the other way and which will shortly be noted. In the Tennessee case a forged check payable to bearer was cashed by the defendant bank "and indorsed by it and passed" through three successive banks, the last bank presenting the check and receiving payment from the plaintiff. No recovery was permitted.

We will now examine the cases where a contrary view has been taken of Section 62. In North Dakota in 1906,<sup>82</sup> the Act having been adopted there in 1899,<sup>83</sup> the doctrine of *Price v. Neal* was repudiated *in toto*, the Court saying:

"Being convinced as we are that this doctrine advocated by the great majority of the cases which have come to our attention to the effect that a drawee of a check should be excepted from the ordinary rules relating to the right to recover money paid by mistake, is unsound *and has never been adopted in this State by usage or Statute*, it would be nothing less than usurpation of legislative power by this Court to declare that rule to be the law of this State because Courts in other States have so held."

Similarly in Washington in 1902,<sup>84</sup> the Act having been there adopted in 1899, recovery was permitted by the paying drawee bank on the ground that the defendant, by presentment and in-

<sup>80</sup> *Farmers', &c., Bank v. Bank of Rutherford*, 115 Tenn. 64 (1905).

<sup>81</sup> *Williamsburgh Trust Co. v. Tum Suden*, 105 N. Y. Supp. 335 (1907); s. c., 120 App. Div. 518.

<sup>82</sup> *Bank of Lisbon v. Wyndmere*, 15 No. Dak. 299 (1906).

<sup>83</sup> Revised Code of North Dakota 1899, chap. 100, pp. 1039-1060.

<sup>84</sup> *Canadian Bank of Commerce v. Bingham*, 30 Wash. 484 (1902); s. c., 71 Pacific Rep. 43 (1902).

dorsement after failing to have the payee indentified, had been guilty of negligence. No mention whatever is made of the Act. We must therefore regard the decision as holding that the Act in Washington does not forbid recovery under the recognized exceptions to the doctrine of *Price v. Neal*. Such also is the *obiter* view of the Supreme Court of Nebraska.<sup>85</sup>

Similarly the Supreme Court of New York, Appellate Division, has held under the Act that the payee who, ignorant of the forgery, endorses a forged check made payable to bearer must restore the money to the drawee-bank on the ground that, being the first endorser, his duty was to know the signature of the drawer and furthermore that "by his unqualified endorsement he facilitated the forgery" and that "it was but natural for the bank to assume that his endorsement warranted the genuineness of the signature."<sup>86</sup>

Two years later the New York Court of Appeals<sup>87</sup> permitted a paying drawee bank to recover money paid on a forged check (purporting to be drawn by its customer) under the following peculiar circumstances. The defendants' land had been relieved from an assessment lien by the payment of the check in question. The City of New York had been paid its assessment by means of the forged check. The plaintiff bank had refunded the amount of the forged check to its depositor. It was held that the plaintiff was entitled to recover from the defendants the amount of the check on the theory that the bank was entitled to be subrogated to the extinguished lien of the city and to enforce it against the money which the defendants had received from the purchaser of the property. The Court makes the very broad and general assertions that Section 62 "applies only in favor of one who is a holder for value of the instrument which turns out to have been forged;" \* \* \* that "this enactment is merely declaratory of the common law."

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<sup>85</sup> *State Bank of Chicago v. First Nat. Bank of Omaha*, 127 N. W. 244 (1910).

<sup>86</sup> *Williamsburgh Trust Co. v. Tum Suden*, 105 N. Y. Supp. 335 (1907); s. c., 120 App. Dw. 518.

In accord with this exception to *Price v. Neal* under the American Law Merchant are *Bank v. Bangs*, 106 Mass. 441 (1871); *Bank v. Bank*, 151 Mass. 280 (1890).

<sup>87</sup> *Title Guarantee, &c., Co. v. Haven*, 196 N. Y. 487 (1909); s. c., 89 N. E. 1082.

It is quite plain therefore that a number of States are not adopting the Missouri Court's interpretation of the Act but, despite Section 62, are reading into that section all the exceptions to the doctrine of *Price v. Neal*, which previous to the Act existed under the American law merchant. Obviously such an interpretation as this latter one leaves the law of mistake and negligence and estoppel in the case of payment of forged checks just as uncertain and the jurisdictions just as contradictory as before the Act.

Section 62 of the Act is a re-enactment of Sec. 54 of the English Bills of Exchange Act.

On English soil Sec. 54 created no doubt or confusion because the English courts have never departed from the rigor of *Price v. Neal*. "The holder of a bill is entitled to know on the day when it became due whether it is an honored or dishonored bill."<sup>88</sup> Transplanted to American jurisdictions, where varying and fluctuating doctrines have resulted from balancing in one scale the doctrine of *Price v. Neal* and in the other scale, the negligence of the holder to inquire or his breach of duty to communicate suspicion, nothing but perplexity and confusion must result from the apparently plain words "the acceptor by his acceptance admits the genuineness of the drawer's signature." It is wholly irrelevant and untrue to say that "this enactment is merely declaratory of the common law." As to the common law of England, yes. As to the common law of very many American States it was untrue as to the paying drawee or bank.

The deplorable situation into which the American law is now being dragged by Section 62 is plainly due to overlooking the effect of transplanting the English Section 54 in American jurisdictions which did not countenance the strict doctrine of *Price v. Neal*. Another lesson to be drawn from Section 62 is the impossibility of foreseeing how a code will be interpreted. In all the criticism which the Act received before adoption the attitude of the Missouri and Tennessee Courts as against that of the Courts

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<sup>88</sup> *Cocks v. Masterman*, 9 B. & C. 908 (1829), the Court denying recovery where the paying drawee demanded back the money by one o'clock in the afternoon of the following, but doubting what they would hold "if notice of the paying had been given to the defendants on the very day on which the bill was paid so as to enable the defendants on that day to have sent notice to other parties on the bill."

of New York and North Dakota and Washington was not anticipated.

The American exceptions to the rule in *Price v. Neal* though widely recognized are not uniformly adopted. To legislate satisfactorily on so confusing a question as the definition of the circumstances justifying and the circumstances not justifying an equitable action for money paid under mistake is impossible. It would be like making a code definition of fraud or of equitable estoppel. It would be equally inconceivable that such an act if uniformly enacted would long remain uniformly interpreted.

The immediate danger under Sec. 62 is the likelihood that some of the States which had previously recognized exceptions to the rule of *Price v. Neal* will limit the act to cases where the acceptor is the defendant, or, unconcerned with the Act, pursue their development of theories of equitable recovery based on the defendant's negligence or misconduct or warranty implied from presentment. Others as in Missouri and Tennessee will hold that *Price v. Neal* is made the law by the Act and the drawee who has paid is invariably estopped.

Section 62 expresses the doctrine of *Price v. Neal* without any of its recognized American qualifications of an equitable character. Section 62 does not therefore represent the American law.

It should be repealed by a section which will leave the questions thereunder arising to the solution of the law merchant.<sup>89</sup>

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*(To be continued.)*

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<sup>89</sup> In Pennsylvania there is an additional reason for the repeal of Section 62. By the Act of 1849 (Pamphlet Laws, 1849, No. 310, Sec. 10), recovery is permitted where money has been paid on a forged instrument. This act has been held to apply in favor of the drawee bank paying its customer's forged check (*Bank v. Bank*, 78 Pa. 233 [1875]). In the writer's opinion, Section 62 of the act has repealed the Act of 1849. It is inconceivable that any legislature should intend that a paying drawee can recover back money paid to a holder on a forgery of the drawer's name and yet be liable on his acceptance to that holder if sued thereon. He would be compelled to pay and instantly permitted to recover what he had paid. Facts constituting no defence would yet grotesquely constitute a cause of action. Therefore, it must be understood that the Act of 1849 is repealed in Pennsylvania. Which of the foregoing conflicting decisions noted under Sec. 62 is then the law of Pennsylvania today as to the meaning of Sec. 62?